The foregoing case seems to involve a question of such unusual interest, that we have regarded it worthy of preservation, in a form generally accessible to the profession, throughout the country. We do not see how the courts can adopt any general rule of presumption upon the question of the time of loss in such cases, until the necessities or convenience of business shall have established one. Questions of reasonable time, in all cases of demand and notice, were originally determined by the jury. It is now settled by custom and usage, and has become a full rule of law. The same may sometimes be true in the question before us.

I. F. R.

Court of Appeals of New York.

LOWELL HOLBROOK AND OTHERS *vs.* FRANCIS VOSE AND OTHERS.

Where goods are sold by a vendor to a vendee transacting business at the same place with himself, and no transit of the goods is contemplated between the parties, and, by the contract of sale, the goods are to be delivered at fixed dates on the receipt of the vendee's notes, on the delivery of the notes, the right of stoppage in transitu does not exist.

It is immaterial that the goods are immediately put by the vendee upon their transit to a distant place, or that the fact that they were to be so transmitted was known to the vendor, provided that the transit was not named to the vendor at the time of the contract.

Where goods are in bond for duties, they may be sold subject to the lien of the United States. If the vendor consents to a withdrawal for transhipment, and the vendee executes the customary bond for that purpose, the right of stoppage in transitu can no longer be exercised by the vendor.

Even assuming that the right of stoppage in transitu continued as between the vendor and the vendee, it is lost if the vendee assigns to an honest purchaser a bill of lading of the goods given to himself on his own transhipment. If a loan is made to the vendee on the faith of an assignment of the bill of lading, which is executed several days after the loan, the delay being incidental to the transhipment, the loan is in contemplation of law made upon the bill of lading, and the lender can claim the rights of a purchaser in good faith.

A., a foreign railroad corporation, having an office in New York, and an executive committee with full power to transact its business, made a contract through its committee with B., for the purchase of a large quantity of railroad iron. The iron was to be delivered at a fixed time on the reception of the company's notes with certain collateral securities. The notes and securities having been given accordingly, a part of the iron on shipboard in port was withdrawn from bond by B.'s consent, and a bond given by A. to the United States to secure the payment of duties, as a condition of transhipment to Milwaukie. While the transhipment was proceeding, A. borrowed money from C. on the faith of the bill of lading. This was not executed until several days after the loan, owing to the fact that the shipment was to be made on a number of vessels, and the bill of lading was not to be executed until all the vessels were laden. The bill

of lading having been made out to A., and assigned by A. to C., *Held*, that on A.'s insolvency B. could not exercise the right of stoppage in transitu.

B. having taken possession of the iron by a proceeding analogous to a writ of replevin, *held* that he might be treated by C. as a trespasser.

It seems that the sureties in the replevin bond might also be treated as co-trespassers.

Appeal from the Superior Court of New York.

Daniel Lord and *Luther R. Marsh*, for appellants.

William M. Evarts, for respondents.

The facts sufficiently appear in the opinion of the Court, which was delivered by

DAVIES, J.—The defendants, Vose, Livingston, and Perkins, were, in June 1857, merchants doing business in the city of New York under the firm of Vose, Livingston & Co. Previous thereto, a corporation had been created by the Legislature of the state of Wisconsin, under the corporate name of The Chicago, St. Paul and Fond-du-Lac Railroad Company, for the purpose of constructing, maintaining, and operating a railroad from Chicago, in the state of Illinois, through Janesville and Fond-du-Lac to Lake Superior, a distance in all of about 500 miles. For the facility of transacting its business, the company established an office in the city of New York, and it would appear to have been established as early as April 6, 1857. The powers of the executive committee, located in New York and having charge of the office there, seem to have been full and ample, to make contracts for the company, to borrow money on its account, to cause a mortgage to be given upon any or all the property of the company, and, in general, to manage its business affairs. By a resolution of the board of directors, any two of the committee, with the president of the board, were authorized to transact business.

During the summer of 1857, and for the period covered by the transactions between the parties to this suit, Wm. B. Ogden was the president of the company, Charles Butler the treasurer, and J. W. Hickok, vice president, and with William C. Langley, composed the executive committee at this time.

They all resided in the city of New York, and the committee were in the practice of meeting at the office of the company in that city during the summer of 1857, and then transacting the business of the company; and it appears that, during that period, the persons above named were the acting officers of that

company in that city, by whom its business was principally transacted.

On the 22d of June 1857, Vose, Livingston & Co. entered into a contract in the city of New York, with said railroad company, through its executive committee, whereby they sold to the company 2000 tons of railroad iron, at 52 dollars per ton in bond, payable in the notes of the company at four, six, and eight months *from the delivery* of the iron—that is, from the commencement of the delivery of each parcel, one-third each, with interest at seven per cent. The contract declared that one thousand tons of the iron was then in port, and that the same was *to be delivered* from the first to fifteenth of July, and the balance to arrive in the latter part of July or in August. As collateral security for the payment of the notes, the eight per cent. first mortgage construction bonds of the company, of the par value of twice the amount of the notes, were to be lodged with Vose, Livingston & Co., who were to have the power, in case of the non-payment of the notes, to sell said bonds or enough to realize the amount due on the unpaid note or notes, on giving notice to the company or its agent in New York.

The delivery was to be from the commencement of each parcel. The iron was imported into the port of New York by Vose, Livingston & Co., in the ship National, andwas on board that ship in bond at the time the contract of sale was made. A bill of parcels was made out by Vose, Livingston & Co., for 1300 tons of iron, it having been ascertained that there was that quantity on the ship, instead of 1000 tons, as mentioned in the contract of sale, drawn up on June 21st, headed "Chicago, St. Paul and Fond-du-Lac R. R. Co., to Vose, Livingston & Co. for railroad iron delivered under contract of 22d June, 1857," specifying the quantity of iron, and enumerating the notes to be given therefor, amounting, with interest thereon, to $69,976.94, and at the bottom it reads as follows: "To be secured by a deposit of 140 of the company's first mortgage construction bonds, E. E., New York, 22d June 1857." It is manifest that this bill of parcels must have been delivered to the company as a memorandum for it to prepare and execute the requisite notes. By the terms of the original contract of sale, the iron was *to be delivered* to the company from first to fifteenth July. On the first of July, the deputy collector of the port issued a permit to the storekeeper of the port, in whose custody and care the ship National was, stating that a bond had been given for the delivery

of the iron at the port of ———, withdrawn for transportation by the company, to be marked port of New York, in bond for Milwaukie, which was imported by Vose, Livingston & Co. in the National, June 17, 1857, and stating therein "you will deliver the same." On the 25th of June, 1857, Hickok, the vice-president of the company, and one of the executive committee, made an entry at the custom-house in New York, which stated that the said railroad iron was intended to be withdrawn from warehouse by the said railroad company for transportation to Milwaukie, and marked "per Troy and Oswego line to Oswego, thence, per sailing vessel, to Milwaukie, consigned to T. F. Johnson," and which was signed by Hickok; and at the foot thereof was this memorandum: "We authorize Chicago, St. Paul and Fond-du-Lac R. R. Co. to withdraw from warehouse the goods described in this entry. VOSE, LIVINGSTON & Co."

The circumstances disclosed make it clear, I think, that this authorization to withdraw the iron from the custom-house was not given till on or after the third of July, when the vendors received payment for it, and that it is to be regarded as the equivalent of the delivery order.

On the 3d of July, the railroad company made and executed the bond required by the laws of the United States where goods are withdrawn from warehouse at a port of entry to be transported in bond to another port of entry within the United States, and at which latter port the duties of importation are to be paid; which bond was in the penal sum of $103,168, and had a condition that if the obligors should, within ninety days or such further time as the Secretary of the Treasury might allow, transport *via* the canal, &c., the said railroad iron, and should deliver the same to the collector of the port of Milwaukie, and deliver within a reasonable time to the collector of the port of New York a certificate of the collector of the port of Milwaukie, that said iron had been so delivered to him, or, failing so to do, should pay to the collector of the port of New York the duties to be ascertained as due and owing on said merchandise, and an additional duty of one hundred per cent., imposed by the Act of Congress of 28th of March 1854; then the obligation was to be void, otherwise to remain in force. The permit had indorsed thereon, "entered July 3d 1857; delivered, H. H. J." The receipt appended to the bill of parcels, made out June 23d, is in these words:—

"Received payment, by notes four, six, and eight months, from July 3d 1857, and 140 bonds, as collateral for the within.

"VOSE, LIVINGSTON & Co.,

"Per GEO. F. BATE.

"New York, July 6th, 1857."

The railroad company employed the Troy and Oswego Line to take said railroad iron from the ship National in New York, and to transport it for them to Milwaukie, and the quantity there to be taken was that described in the bill of parcels, receipted for by Vose, Livingston & Co., consisting of 7338 bars. The bars were put on board the canal-boats of that line from the ship National, and 2283 were put on board boats on the 10th July, and the balance on boats on the 11th, 18th, 17th, 20th, and 21st days of July. In the early part of July, members of the executive committee of the company applied to the plaintiffs for a loan of money, and on the 10th of July the plaintiffs loaned the company $50,000 in their notes, on the hypothecation of said iron. The executive committee, under date of July 10th, made an order authorizing Hickok, their vice-president, to borrow of the plaintiffs that sum, and to hypothecate the said 1300 tons of railroad iron, imported per ship National, and which they stated in said order were then in the course of transhipment from the port of New York to Milwaukie, consigned to S. F. Johnson, engineer; and subjoined thereto was a statement signed by Hickok, as vice-president, that he had that day (July 10th) notified S. F. Johnson, Esq., of the order for 1300 tons iron given to Messrs. Holbrook and Nelson. At the time the notes were advanced by plaintiffs to the company, they received from the company a paper dated July 10th 1857, stating that the company had purchased and paid for 1300 tons of railroad iron, as per invoice therewith, imported per ship National, and now discharging from said vessel under permit of the United States custom-house, for its transhipment from New York to Milwaukie, subject to delivery there to S. F. Johnson, engineer of said road, on payment of duties thereon. In consideration that the said company had that day borrowed of the plaintiffs, on the security of said iron, $50,000, said company transferred said iron to said plaintiffs as security for the payment of that sum, and delivered therewith an order on the consignee aforesaid for the delivery of said iron. The said order authorized and requested Johnson to deliver to the order of the plaintiffs the whole or any part of said iron, and to transfer all

title to the same to them. These papers were all delivered to the plaintiffs at the time, and upon the faith of which they made the loan. On the 22d of July, all the railroad iron being then on the boats of the Troy and Oswego Line, that company issued a receipt or bill of lading in these words: "Troy and Oswego Line Office, 107 Broad street. Proprietors, L. B. Crocker & Co., Oswego. Received, New York, July 22d 1857, from ship National, the following articles on board boat, viz.: seven thousand three hundred and thirty-six bars railroad iron (7336 rails)."

Marked,
Chicago, St. Paul,
Fond-du-Lac Railroad Co.

It contained stipulations on the part of the carriers and shippers, and was signed "For the Troy and Oswego Line. GEO. JENNISON, agent."

On the same day there was indorsed on the back thereof an assignment and transfer, by the company to the plaintiffs, of the iron therein mentioned as collateral security for their notes advanced to the company to the extent of $50,000, as per agreement dated July 10th 1857. The bill of lading and assignment were delivered to the plaintiffs on the day of their date. It was stated to the plaintiffs previously and on the 10th of July, that the bill of lading could not be given until the entire parcel was put on the boats, and that it would then cover the whole, and when received the company promised to deliver it to them. On the 1st of August following, Jennison, the agent of the canal line, indorsed on the bill of lading a recognition of the transfer of the property mentioned therein to the plaintiffs. It does not distinctly appear when the boats laden with the iron left the city of New York. On the 25th of July some paper of the company went to protest, and on the 1st of August Vose, Livingston & Co. notified Jennison, the agent of the carriers in the city of New York, that the 1300 tons of iron taken from the ship National was their property, and on the 3d of August the carriers at Oswego were notified of the claim of Vose, Livingston & Co. On the 4th of August, summons and complaint, affidavits, undertaking and requisition in an action to recover the possession of said iron by Vose, Livingston & Co., were placed in the hands of the sheriff of Oswego county, and by virtue of which he took said iron and delivered it to them. The defendants Dawson & Brown were the sureties in the undertaking, and justified as such. This suit was commenced against all the defendants, Vose,

Livingston & Co. and Dawson & Brown, for the forcible and wrongful taking of said property, and to recover the value thereof with interest. The judge of the Supreme Court before whom the cause was tried, dismissed the complaint, and judgment was entered for defendants, and which, on appeal, was affirmed at the General Term. The plaintiffs appeal to this court. Vose, Livingston & Co. claim to hold the iron in controversy by the exercise of their right of stoppage in transitu—a right given by law to a vendor on the happening of the insolvency of the vendee, before delivery, actual or constructive, to resume and enforce his lien for the price of the goods sold, by retaking them. Parsons's definition of the right is, "If a vendor, who has *sent* goods to a purchaser *at a distance*, finds that the purchaser is insolvent, he may stop the goods at any time before they reach the purchaser. This right is called the right of stoppage *in transitu*." Parsons on Con., vol. 1, p. 476. The right to stop goods in transitu, though first introduced and founded in equity, has long been considered and acted upon as a legal rule. The circumstances under which this right may be exercised are clearly and succinctly stated by Chancellor WALWORTH, in *Covell* vs. *Hitchcock*, in the Court of Errors, 23 Wend. 611. He says: "The law appears to be well settled that the right of stoppage in transitu exists so long as the goods remain in the hands of a middleman on the way to the place of their destination, and that the right terminates whenever the goods are or have been either actually or constructively delivered to the vendee; a delivery to the general agent of the vendee is, of course, tantamount to a delivery to himself. The time during which the right exists, therefore, is during the whole period of the transit from the vendor to the purchaser, or the place of ultimate destination as designated to the vendor by the buyer; and this transit continues so long as the goods remain in the possession of the middleman, whether he be the carrier either by land or by water, or the keeper of a warehouse or place of deposit connected with the transmission and delivery of the goods." The doctrine as applicable to this subject is well stated by Bell, in his Contracts of Sale, p. 122. He says that it is reducible to the following propositions:—

1. That the delivery is not complete, nor the possession of the seller terminated, till the goods have come within the power and disposal of the buyer.

2. That till this has taken place, the seller has a right to direct

the goods to be withheld by the carrier, wharfinger, or other middle man, in whose hands they may be, *for the purpose of being forwarded to* the buyer.

3. That the seller's right so exercised is grounded in equity, not on the footing of the contract being dissolved, but as a just security for the price; the goods so stopped being in the hands of the middleman no otherwise than they would have been in the seller's own hands, if they had not left his premises, that is under lien for the price.

4. That the consequence of this is, to give to the buyer or his creditors a right to insist for delivery of the goods on tendering the price; and to the seller a right to demand the price as a debt, secured by real lien on the goods.

5. That the right of the seller cannot be exercised to the prejudice of any third party, who *bonâ fide* have received from the buyer a transference by bill of lading, or other negotiable instrument.

It is thus seen that the right exists, until the goods have arrived at the place of destination named by the buyer to the seller, the place directed by the former, to which the latter is to send them; and the transit spoken of in the cases, is the passing over of the goods from the seller, to this designated or named place. It is often difficult to determine whether the goods, which it is sought to stop, are still in transitu. Parsons says, "The general rule is, that they are so not only while in motion, and not only while in the actual possession of the carrier (although he was appointed and specified by the consignee), but also while they are deposited in any place connected with the transmission of them, or rather while in any place, not actually or constructively the place of the consignee, or so in his possession or under his control, that the putting them there implies the intention of delivery." Parsons on Contracts, vol. 1, p. 482. A case can hardly occur for the exercise of this right, except when the vendor and vendee are residents of different localities, and the goods are purchased by order, with directions to forward them by the seller to the purchaser at his place of residence or business, or to some agent of his at another locality.

ASHURST, J., says, in *Lickbarrow* vs. *Mason*, 2 Term Rep. 71, "Where a man sells goods, he sells them on the credit of the buyer; if he delivers the goods the property is altered, and he cannot recover them back again, though the vendee immediately becomes a bankrupt. But, when the delivery is to be at a distant

place, as between the vendor and vendee, the contract is ambulatory till delivery, and, therefore, in case of insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu.*" An examination of the cases will show, as already observed, that the question of stoppage *in transitu* can rarely, if ever, arise, when the vendor and vendee are in the same place, and the property sold is to be delivered there, as such delivery almost immediately follows the sale, and there is in fact no transit.

All the cases concede, that even in case of a transit, from the vendor to the vendee, set in motion by the former, from the place of purchase to that of ulterior destination named by the vendee to the vendor, a delivery of the goods to the vendee, or his agent, before the exercise of the right of stoppage *in transitu*, whether actual or constructive or symbolical, terminates the right. The controversy in the cases, therefore, turns upon the questions, first, is there a transit? second, has there been a delivery of any kind, to the vendee or his agent, before the goods reach the point of ulterior destination named by the vendee to the vendor?

Before proceeding to an examination of the cases, it may be well to advert to the facts in the present case. The vendors and the vendees, at the time of the sale in this case, were both transacting business in the city of New York. The former resided there, and it does not appear had any other residence or place of business. The railroad company, the vendees, had an office there, and all its affairs and business were managed by an executive committee, all of whom resided there, and there transacted its business. The vendors and vendees in this case were, therefore, of the same locality. The contract of sale of June 22d 1857, did not refer to the company as located elsewhere, except, perhaps, in the latter clause, as to notice to be given of the sale of the bonds, which, it is stated, was to be to the company or its agent in New York. The notes given for the purchase-money were to be dated New York, the delivery of the iron to the vendees was to be made there, and the notes were to be dated as of the day of delivery, and which, as to this parcel of iron, was to be from the 1st to the 15th of July. No place of ulterior destination was named by the vendees to the vendors. And if it is assumed that the vendors understood that the vendees intended to transport the iron to Milwaukee, for use or sale there, those circumstances made no difference, as will be conclusively shown

by cases hereafter cited. The delivery to the vendees was made and completed on the 3d of July, in the city of New York, at which time they gave their notes for the purchase price of the iron, and the collateral security called for by the contract, and the company or its agents then took the actual possession and control of the iron. *Hammond* vs. *Anderson*, 4 Bos. & Pull. 68, was a controversy between the assignees of the bankrupt and the vendor of the goods. At the time of the sale of the goods, they were on the wharf of the defendant. The purchaser took away a portion, and before the residue was delivered became a bankrupt, and the vendors claimed to stop the residue. Sir JAMES MANSFIELD, C. J., said: "As to those bales which were sent away, the bankrupt had taken actual possession, and therefore no question can arise; and when it is admitted that he had taken a part, how can it be said he had not taken the whole? The price was entire, and the whole to be paid for in one bill." HEATH, J., said the contract was entire, and part having been taken away, the privilege of stopping *in transitu* could not attach. ROOKE, J.—"The whole of the goods was paid for by one bill; a general order was given for the delivery of the whole, and the purchaser, under that order, went and took away a part—how could he more effectually change the possession?" CHAMBRE, J., said it was a much stronger case than *Slubey* vs. *Heyward*, 2 H. Bl. 504, which proceeded upon the principle that a delivery of part was a delivery of the whole. But here was an actual delivery of the whole. There, the person who made the delivery, delivered a part out of the ship. But here the bankrupt had actual manual possession of every article, and having weighed them all, he took upon himself to separate them. It was clear that the original vendor had no claim.

Harmer vs. *Meyer*, 6 East 614, was a case of a purchase of goods (a quantity of starch) where vendor and vendee resided in the same place. The order given by the vendor to the person having the starch sold in his possession, was to weigh and deliver *all his starch*. A portion was weighed and delivered to the vendee before insolvency, and the question arose between his assignees and the vendor, which was entitled to the portion not weighed, and it was held that the vendor still retained it, and that till it was weighed, his agents were not authorized to deliver it. Lord ELLENBOROUGH said: "If anything remain to be done on the part of the seller, as between him and the buyer, before the commodity

purchased is to be delivered, a complete present right of property has not attached in the buyer."

Meletopulo vs. *Ranking* was a case before Lord LYNDHURST, and is reported in 1 N. Y. Legal Observer, p. 299. One Sargint commissioned the plaintiff to purchase at different places a cargo of currants, which were to be shipped at Vostizza for England. The currants were accordingly purchased, and sent to Vostizza, and a vessel was chartered by Sargint, who gave directions to send them in to Ranking. Lord Chancellor held that if the plaintiff had been ordered to buy and ship them to England, he might have stopped them in their transit, because the transit would not have been ended until his order was completed. The currants were to be delivered at Vostizza and then shipped. That the sole question was, whether there was a delivery to Sargint at Vostizza. The bill of lading is the material fact, and that states the goods were for Sargint. It was true that they were in fact put on board the ship by the plaintiff, and the question was by whom they were shipped, not who put them on board, and the lord chancellor held that the shipment being made by Sargint, put an end to the right to stop *in transitu.*

Barrett vs. *Goddard*, 3 Mason C. C. Rep. 107, is a case where the right of stoppage was set up. The seller and buyer both resided in Boston, and the former sold to the latter forty-one bales of cotton then being in the seller's warehouse. As an inducement to the purchase, the seller agreed that the cotton might remain there as long as it suited the convenience of the buyer The buyer gave his note to the defendant, the seller, for the amount of the sale at eight months, and received a bill of parcels, receipted by the note. The buyer did not go even to the warehouse to see the cotton. Before the note became due, the buyer became insolvent, and made an assignment to plaintiff, who claimed the cotton of defendant, and he refused to deliver it, setting up his right to stop *in transitu.* Judge STORY, in delivering the opinion of the court, says the doctrine of *Hammond* vs. *Anderson*, *supra*, has never been denied, and he holds that the converse doctrine flows from the same principle, and that is: that where no further act remains to be done on either side, and the thing sold is separated and distinguished from all others, as soon as the terms of the contract are completed and complied with, the property passes. Applying these principles to that case, Judge STORY said nothing remained to be done on either side. The bales were

all marked and numbered, and sold by the marks and numbers. They were perfectly distinguishable from all others, and the terms of the contract on the other side were fully complied with. The payment was made in the mode agreed on, by giving a note payable at a future day. Neither party contemplated any further act to be done. He adds: "The other points as to the lien and right of stoppage *in transitu* may be disposed of in a few words. The very contract itself repels the notion of a lien. The goods were deliverable immediately at the option of the vendee. The payment was by a note on time. Now, giving such a credit for the price under such circumstances, is decisive against any implied right of retainer or lien for the price? How, then, can the court assert one, when it is inconsistent with the very terms of the bargain? Besides, if this delivery was complete, there is necessarily an end of the lien. The transit would be ended, and the right of stoppage *in transitu*, once gone, could not be reassumed." The plaintiff had judgment.

Crawshay vs. *Eades*, 1 B. & C. 181, shows that when a carrier has begun to deliver to the consignee, but stops in the course of it, his special property remains till the freight for the whole cargo is either tendered or paid, or till he has parted with the possession of the whole; then, as a consequence, the consignor is not divested of his right to stop *in transitu*.

In this case, ABBOTT, C. J., says the whole question was, whether there had been a delivery or not; and BAYLEY, J., said: "It is quite clear that if the iron was once completely delivered, the *transitus* was at an end."

Allen vs. *Gripper*, 2 Tyrw. Rep. 217, was tried before LYNDHURST, C. B., at the London sittings, and the facts appearing were that one Pestall, through a broker, purchased of the plaintiff a quantity of oil-cakes. The cakes were shipped at Twickenham, on the Thames, to be conveyed down the river to the mouth of the Lea, then to be transhipped into the defendants' barges to be carried along the Lea to Hertford, where the defendants resided. No water-carriage existed between the latter place and Baldock. The cakes arrived at Hertford, and were placed in defendants' warehouse. It appeared that oil-cake consigned to Pestall, from the Thames, had for some time been warehoused there for sale, without ever having been sent to Baldock. The cakes were taken into the defendants' warehouse on the 20th of December, Pestall having became insolvent on the 15th, and

on the former day the plaintiff claimed to stop the cakes. The jury found for the defendants, adding that they considered the goods were intended to be left at the defendants' warehouse, as a place of general deposit, for the convenience of sale, and were not to be taken home to Pestall's house. BAYLEY, J., says: "In this case, it appears to me that the original *transitus* ended when the goods reached the warehouse in which the consignee intended them to be deposited to abide further orders from him, without which they would remain stationary. The right to stop *in transitu* was therefore gone." And he held this case was clearly distinguishable from that of *Crawshay* vs. *Eades*, *supra*.

Wentworth vs. *Outhwaite*, 10 M. & W. 436, was elaborately argued, and the question turned upon the fact whether the *transitus* was at an end. One Weatherall, of Michley Mills, a place about thirty miles from Leeds, purchased twenty mats of flax from Hill & Co., of Hull, and they were forwarded by railway to Leeds, and duly arrived at the warehouse of the defendants, who were carriers, and Weatherall sent his carts and took away ten of the mats. Weatherall having become bankrupt, Hill & Co. claimed to stop the remaining ten mats in defendant's warehouse, as in transit. The jury, in answer to a question put by the learned judge, found that the parties contemplated that the flax was to be used for the purpose of manufacture at Michley Mills.

PARKE, Baron, concurred with Lord ABINGER, Chief Baron, that the *transitus* was at an end. He says: "It may be considered as having been at an end, both because the goods had come into the constructive possession of the vendee, and because they had arrived at their place of destination."

Dodson vs. *Wentworth*, 4 Man. & Gran. 555, is another case growing out of the bankruptcy of the same person mentioned in the preceding case. In this case the plaintiff was a flax merchant in London, and for many years had dealings with Weatherall of Michley Mills, about thirteen miles from Boroughbridge, in Yorkshire. The goods which Weatherall purchased from the plaintiff usually were sent by sea to York or Hull, and thence by canal to Boroughbridge, and from thence conveyed to Michley Mills, sometimes by a carrier, and sometimes in Weatherall's own carts. The flax in controversy was shipped on board a vessel bound for Boroughbridge, "to be delivered at the aforesaid port of Boroughbridge unto Mr. Thomas Weatherall, Michley Mills, near Ripon, or to his assigns, he or they paying freight for the said goods

15*s.* per ton, delivered free in Boroughbridge." The Laurel arrived at York, and the flax was transhipped into a boat belonging to the Ripon Fly-boat Company, which conveyed goods by canal, and the flax was landed from the fly-boat at Boroughbridge, and was lodged there, in a warehouse there belonging to the Ouse Navigation Company, which had no connection with the other company. Weatherall never claimed the flax or exercised any act of ownership over it. The plaintiff claimed that the transitus was not at an end, and that his right of stoppage had been properly exercised. TINDAL, C. J., said it was not immaterial to observe, that the warehouse in which the goods were lodged was not the warehouse of the carrier, as some of the cases turn upon the point, that the *transitus* is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey or voyage, but even while they are in a place of deposit connected with their transmission. He further says, that the state of facts very closely resembles that in *Dixon* vs. *Baldwin*, where it was laid down that the delivery of goods to the appointed agents of the vendee, from whom the agents were to receive orders as to the ultimate destination of the goods, puts an end to the right of stoppage *in transitu*. MAULE, J., said, "the duty of the carriers was at an end, when they had brought the goods to Boroughbridge and had delivered them there to the vendee, or to some person on his behalf. * * I think it quite clear, that under all the circumstances, upon the delivery at the warehouse of the Ouse Navigation Company, the right of the consignor to stop these goods was at an end."

Valpy vs. *Gibson*, 4 C. B. 837 (56 E. C. L. R. 835), presents many features like the case now under consideration, and the doctrine of which is pertinent to it. In that case, Brown, a merchant at Birmingham, bought goods of Gibson, Ord & Co., merchants of Manchester, to ship to Valparaiso. On the 20th March 1844, the goods were, by Brown's direction, sent to a firm of shipping agents at Liverpool, employed by Brown to receive and forward them to Valparaiso, and on the same day the vendors wrote to the shipping agents advising them of the transmission of patterns, which they requested them to ship with the goods, "as Brown might direct them to be shipped." The goods were, on the 4th of April, shipped by the shipping agents on board a vessel bound for Valparaiso, and were afterwards relanded, by order of a member of the house at Valparaiso to which they were

consigned by Brown, and sent to the vendor's house at Manchester, for the purpose of being repacked in smaller cases. WILDE, C. J., in delivering the opinion of the court, said: "With regard to the right of stoppage *in transitu*, it appears to us, that, though the defendants knew the goods were to be sent to Valparaiso, and so informed Leech, Harrison & Co. (the shipping agents) when they forwarded them to Liverpool, yet that Leech, Harrison & Co. could not simply on that information forward the goods to Valparaiso, but that they held them subject to such orders as Brown might give as to forwarding them to Valparaiso or elsewhere, and the *transitus* was consequently at an end as soon as the goods came to the hands of Leech, Harrison & Co. But when Leech, Harrison & Co., by the order of Brown, relanded the goods, and by order of Allison (who must be taken to have acted under the authority of Brown) sent them to the defendants to be repacked, the possession of the goods, as well as the property, vested in Brown, who, in causing them to be relanded and sent to the defendants, dealt with the goods as owner; and this would certainly put an end to the *transitus*, even if it had not been determined, as we think it was, by the original delivery to Leech, Harrison & Co."

Another controlling case, in my view, is that of *Cowasjee* vs. *Thomson*, 5 Moore Priv. Council 165. It was an appeal from the court at Bombay, by Cowasjee, a Parsee merchant residing there. Respondents were merchants in London, and the appellant was the sole owner of the ship Buckinghamshire. On the 12th November 1841, while the ship was lying in the India Dock, London, in charge of the ship's husband and manager, employed by the appellant, the respondents employed their lighterman to put on board the ship the pigs of lead in question, in two parcels, and the manager received from the respondents, with the lead, two forms of receipt, written wholly by their clerk, to which he affixed his signature, and they were returned by the lighterman to the respondents, and they retained possession of them. On the 18th of December 1841, the firm of Boggs, Taylor & Co., who were the real shippers of the lead, and the purchasers of it from Thomson & Co., became insolvent, and on the 20th and 29th of December, while the lead was still on board the ship in the docks, it was demanded of the manager of the ship. The bill of Boggs, Taylor & Co., accepted by them for the price of the lead, was dishonored when it fell due. On the part of the appellant, it

appeared that on the 30th of October 1841, the respondents contracted to sell to Boggs, Taylor & Co. 100 tons of lead "free on board at £20 per ton, six months acceptance, or 2½ per cent. discount for cash, at the option of B., T. & Co.," and that the lead was shipped in pursuance of the contract. On the 2d of November 1841, B., T. & Co. addressed a letter to Dickenson & Co., requesting them to insure the lead, and to accept two bills for £1500 each, one dated October 29th 1841, the other November 1st 1841, at six months, on the faith that B., T. & Co. would place in their hands the lead in question, or the bills of lading relating thereto, and which bills were accepted by Dickenson & Co. on the 2d of November, and before the shipment, and were paid at maturity. On the 16th, the captain of the ship, without requiring the return of the mate's receipts, signed four bills of lading dated November 15th, prepared by B., T. & Co., describing the lead as shipped by them and to be delivered to B. & A. Hormajee or their assigns, and which bills of lading were indorsed by B., T. & Co. to Dickenson & Co. On the 26th November, B., T. & Co. declined to pay cash for the lead, and accepted a draft therefor at six months dated November 12th. The court at Bombay adjudged that the lead belonged to the respondents. From this decision the appellant appealed to the Queen in Council, and contended that the transit was completed by the shipment of the lead. That it was a complete delivery within the terms of the contract, and the right to stop *in transitu* did not exist after such delivery on board of the ship, although it was well known it was put there to go to a foreign port. Lord BROUGHAM, who gave the opinion of the judicial committee of the Privy Council, said the argument of the respondent and the court below was that the mate's receipts were never given up by respondents to B., T. & Co., and that therefore the sale was not complete, the delivery was imperfect, something remained to be done, and the transaction was not finished nor the *transitus* determined. He said they were clearly of the opinion that the non-delivery of the receipts can have no operation whatever, for the plain reason that it was the clear and bounden duty of the respondents to have delivered them up, and it would be preposterous in them that they should avail themselves of their own wrong. He observed: "Does not the taking of that acceptance, which was by the contract only to be given by the purchaser *on the delivery* of the goods, and to be given for each parcel *as delivered*, at once

show that *the delivery* was completed, that nothing remained to be done, that the goods had reached their journey's end, and that they were no longer *in transitu* to be stopped? The question in all the cases between buyer and seller, which is the case here, is whether or not anything remained to be done as between these two parties. The importance of keeping that in view, whether the question arises between these two parties, or between one of them and a third party, is well stated by LE BLANC, J., in *Burk* vs. *Davis*, 2 M. & S. 404, and in *Whitehouse* vs. *Frost*, 12 East 621. In the present case it is quite clear, that nothing remained to be done between the buyer and the seller, unless it be that the latter ought most certainly to have delivered up the master's receipt, which he wrongfully or by oversight kept possession of, without the shadow of a right to it, and whether it be wrong or error, he is not the party to take advantage of it." Judgment of the court of Bombay was reversed.

Rowley vs. *Bigelow*, 12 Pick. 307, is an instructive case. The facts were, that one Martin purchased of the plaintiffs, in the city of New York, he then also residing and being there, two thousand bushels of corn, then on board the sloop Milan, whereof one of the plaintiffs was master. It was measured and delivered on board the ship Lion, employed by Martin, consigned to defendants at Boston. It was shipped on the 25th of May, and on the same day the Lion left for Boston. On her arrival in Boston, she was boarded, and the corn demanded on behalf of the plaintiffs, on the ground that it had been fraudulently obtained from them. The defendants offered in evidence a bill of lading, dated 17th May, signed by the master of the Lion, purporting to be for two thousand bushels of corn, shipped by Martin, and consigned to defendants; and an invoice from Martin to them to sell the same; and a letter from Martin to them, dated the 17th May, annexed to the invoice and bill of lading, advising them that he had drawn on them a bill for $1000, on account of the shipment. On the 20th of May, defendants accepted the draft and paid it at maturity. SHAW, C. J., in delivering the opinion of the court, says: "The right of stoppage *in transitu* is nothing more than an extension of the right of lien, which, by the common law, the vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. By a bargain and sale without delivery, the property vests in the vendee; but where, by the terms of sale, the price is to be paid on delivery,

the vendor has a right to retain the goods till payment is made, and this right is strictly a lien, a right to detain and hold the goods of another as security for the payment of some debt, or the performance of some duty. But where the vendor and vendee are at some distance from each other, and the goods are on their way from the vendor to the vendee, or to the place by him appointed for their delivery; if the vendee become insolvent, and the vendor can repossess himself of the goods before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This only restores the vendor's lien, and can only take place when the property has vested in the vendee." And the court held there was no right of stoppage *in transitu* in that case.

Hollingsworth vs. *Napier*, 3 Caine's Cases 182, was an action of trover, to recover the value of ten bales of cotton, which the defendant had sold to one Kinworthy, then lying in a public store at the quarantine, in New York, for cash, payable on delivery. A bill of parcels had been made out and marked "cash" on the margin, but no receipt for the money. This, together with an order on the storekeeper for the cotton, had been given to the purchaser, who, without paying for the articles, transferred the bill of parcels and order to the plaintiff, who paid him therefor. At the trial, the jury, under the direction of the judge that the order to the storekeeper was a delivery, found for the plaintiff. On a motion for a new trial, SPENCER, J., delivering the opinion of the court, says: "The plaintiff having, as it must now be intended, gotten possession of the order for the cotton, received a delivery of it, and paid the storage. This acquiring of possession took away the defendant's right to stop *in transitu*. The order itself is a delivery so as to prevent the operation of the statute. But again, the sale is wholly free from that objection, by the delivery of possession under it."

But the facts in the present case are much stronger than those appearing in the cases just referred to. In the present case, the iron sold was in New York, on board the ship National, having been imported by the sellers, and being on shipboard in bond, in custody of the custom-house officers; the seller and buyer, both being in the city of New York, and transacting business there. The terms of sale were notes of the buyer at four, six, and eight months from the commencement of the delivery of the iron, to be secured by bonds of the company as collateral. The quantity

on the ship National having been ascertained to be thirteen hundred tons, a bill of parcels was made out, and receipt of payment therefor, in the notes and the collateral security, as called for by the contracts, was signed by the seller as of the 3d July. Previous thereto, the sellers had given a written authority to the buyer to withdraw the iron from the custom-house, and on the 3d of July it was withdrawn and delivered to the buyer. Was not this a complete, actual, and effectual delivery to the buyer? If not, it is difficult to ascertain what would have made it more so. Clearly, nothing more was to be done between seller and buyer. The former had obtained his contract price for the article sold in the form and according to the terms of his contract, and had receipted payment of the bill of parcels, and had given an order on the custodian, to deliver the article sold to the buyer. This order had been accepted and executed, and forthwith, and on the 10th of July, the article began to be shipped on vessels employed by and paid for by the buyer. The seller had no longer any control over, or any right of interference with the thing sold; and the buyer had not only the actual possession of the thing sold, previous to any assertion by the seller of the right of stoppage *in transitu*, but it had come even, in the language of the judges, to his "corporal touch."

But it is urged, that the iron sold being in bond at the time of sale, and so continuing, could not come to the possession of the buyer—that the possession continued in the United States; we think there is no force in this objection. This court held in *Waldron* vs. *Romaine*, 22 N. Y. Rep. 368, that the property in goods sold in bond in New York, passes to the purchaser upon delivery to a carrier selected by the vendee, although they remain subject to lien for duties, and to the custody of the officers of the customs, until authority to pass them is received at the port of exportation, and which authority in that case the vendor volunteered to take the requisite steps for obtaining. The court said, in its opinion, to be sure the defendant could not take absolute possession of it until it passed to Canada, without first satisfying the claim of the United States government. In other words, he bought it subject to a contingent lien, as people every day buy personal and real property subject to a pledge or mortgage. Nevertheless, their ownership in the thing is complete and absolute, subject to the lien or the qualified ownership of the pledgee or mortgagee. Beyond all doubt, they could sell it to any other

person, still subject to the pledge or mortgage, without asking permission from their seller or vendor." The vendibility of the property was not destroyed by its being subject to the lien, neither did that circumstance impair the absolute title and ownership of the purchaser. The present case is even stronger for the purchaser than that. There the seller had made the withdrawal entry and given the bond, to export the sugar to Canada, or pay the duties required, in case of home comsumption. In this case the purchaser made the withdrawal entry, and gave the bond for the transportation to another port in the United States, and to pay the legal duties there. This bond was accepted as a substitute for the duties, which the purchaser has thus in fact paid. He bought subject to the duties due on the importation of the iron, and took possession thereof subject only to these, and in securing these duties the seller took no part.

In *Mottram* vs. *Heyer*, 1 Denio 483, the goods were ordered by the defendants, merchants in the city of New York, from the plaintiffs, merchants in England. The goods were shipped at Liverpool, consigned to the defendants, they paying freight. The defendants paid the freight, and on the 9th of April 1842, entered the goods at the custom-house. On the 28th of April, the defendants having become bankrupt, the plaintiffs' agent called on them and demanded the goods. The next day, the defendants paid the duties, and passed the goods through the custom-house, when this action was commenced, and the property taken from the defendants' store, where it had just been received from the custom-house. The opinion of the Supreme Court sustained fully the right of the defendants to retain the goods.

BRONSON, C. J., said that the right of stoppage ceases when the goods have reached their place of destination and have come to the actual or constructive possession of the consignee. It is enough that the goods have reached the place of delivery and the consignee has exercised some act of ownership over them. In that case, the goods had reached their place of destination, the carrier had completed his work and received his reward, and the defendants, besides paying the freight, had entered the goods at the custom-house, where they remained at the risk and charge of the defendants. The court did not doubt that the *transitus* was at an end before the plaintiffs attempted to regain possession. The judgment was affirmed in the Court of Errors, but upon what precise ground does not appear (5 Denio 629). It would

seem, from the opinion of the Chancellor, that, in his view, if the duties had been paid before the consignors interposed their claim for stoppage, such payment would have put an end to the claim; but he held the right extinguished by the fact that the consignees had obtained the possession of the goods. If, therefore, this case is an authority for holding that a right of stoppage *in transitu*, which once existed, may be terminated by the consignee entering the goods at the custom-house, paying duties thereon, and taking possession thereof, for the reason that his possession is actual, how much clearer is it that, in the present case, where there was no transit, the buyer, by the entry at the custom-house and the giving the bond as the substitute for the duties, has obtained such possession as will preclude the seller from claiming to exercise that right on the subsequent insolvency of the buyer?

But it is argued that the circumstance that the buyer was engaged in the transportation of the goods to another place than that at which he purchased them, calls this right into action on his subsequent insolvency. The claim of the vendor to stop, in the present case, depends entirely on the fact that the vendee, at the time or after his insolvency, has the goods in motion. In the present case, if the buyer had kept the iron in the city of New York in their or any hired warehouse, it cannot be contended that, on the happening of their insolvency, the right of stoppage would have existed. As already observed, the transit, in contemplation of the law, is that set on foot by the vendor, the passing over of the goods from the vendor to the place of ultimate destination named by the vendee to him at the time of purchase. I have examined a large number of cases, and not one has fallen under my observation where the right has been held to exist in a case like the present, where the vendee has initiated the transit, and with which the vendor had no connection. There is an entire absence of any indication in the contract of sale, or bill of parcels, or receipt for the purchase-money, that the buyer ever named to the seller any place for the ultimate destination of the iron purchased. It is obvious that the party selling might have supposed that the purchaser intended to use the iron, at some point, on its road for its construction; but I see no obligation entered into on the part of the buyer thus to use it, or any *representation* that it would be so used made to the seller.

If I correctly appreciate the legal rights of the purchaser, there

was nothing in any engagement we can see he entered into with the seller, in the present case, to preclude him from making any sale or other disposition of the iron, or the pledge and transfer thereof on the 10th of July to the plaintiffs. In the case of *Harris* vs. *Pratt*, 17 N. Y. Rep. 249, where this court sustained the right of stoppage, it was placed distinctly on the ground that the goods were bought in both cases for shipment to known parties at a given foreign port, which was their ultimate destination, and that destination was mentioned to the sellers. "New York was the destination contemplated from the beginning. It was the one named to the vendor:" Per DENIO, J. It is believed that it is no answer to say, that though Milwaukie or some other point on the line of the purchaser's road was not named to the seller, yet the delivery to the purchaser, knowing that he would transport the article purchased to some such point, has the same legal effect as if the vendee had named such place to the vendor as that of the ultimate destination of the article, and it had been consigned by the vendor to the vendee there. It is apprehended that this cannot be sustained. In the case of *Meletopulo* vs. *Ranking*, *supra*, the cargo of currants was purchased to be sent to England, and it was well known to both buyer and seller that such was to be their ultimate destination, and the seller in that case placed them on board the ship. Yet it was held that the doctrine of stoppage *in transitu* did not apply to the new voyage; that it was the voyage initiated by the buyer, with which the seller had no connection. The plaintiff in that case, it was said, might be considered the consignee of the goods to Vostizza, but it stopped there, and there was no right remaining in him afterwards to stop the goods in their further transit to England. In *Rowley* vs. *Bigelow*, *supra*, the corn was taken from one ship in the port of New York, and laden on another bound for Boston. The purchaser of course knew his intent, in reference to the consignment to Boston, and doubtless the seller was aware also of its destination. He *must have* known it was going by sea *somewhere*. But the court held that the delivery of the corn on board the purchaser's vessel was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end. To the same effect is *Valpy* vs. *Gibson*, *supra*. So, also, in the case of *Cowasjee* vs. *Thomson*, *supra*, the purchaser made the shipment upon the Buckinghamshire for the express purpose of exporting the lead to Bombay. Thomson & Co., the sellers, were aware of the

purchaser's intention thus to export the lead, for they placed it on board the ship at the purchaser's instance, and doubtless well knew where she was bound. In this case, therefore, both parties knew of the further transit contemplated, and the committee of the Privy Council held that such further transit, set in motion exclusively by the purchaser, did not create or revive any right of the original vendor to stop the goods *in transitu* after their delivery on board the ship. A strong case as illustrative of these views is that of *Fowler* vs. *Rymer et al.*, mentioned by Park, counsel in *Hodgson* vs. *Ley*, 7 Term R. 438, but more in detail by LAWRENCE, J., in *Bohttingk* vs. *Inglis*, 3 East 396. That case was tried before GROSE, J. The bankrupts were Hunter & Co., who were in possession of a ship let to them for three years, during which time they were to have complete control of her. The ship had been on one voyage to Alexandria, and had the goods put on board her to carry them on another voyage to the place, not for the purpose of conveying them *from* the plaintiffs *to* the bankrupts, but that they might be sent by *the bankrupts* on a mercantile adventure, for which they had bought them. There the delivery was complete. LAWRENCE, J., in 3 East 398, says he recognises the authority of *Fowler* vs. *Rymer* to the extent that case goes, namely, that if one purchase goods here to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee.

I have found no case holding a different doctrine, and I must regard it, therefore, as settled that, under such circumstances, the right of stoppage cannot exist. Such a result is in harmony with the principle upon which the right is founded. A resort to this right is permitted to enforce the lien of the vendor for the unpaid price of his goods. Ordinarily, a lien only exists while the party claiming it retains the possession of the property upon which it exists. If he surrender the possession, his lien is extinguished. To maintain the lien of a vendor to the purchase price, the courts have always regarded the carrier a middleman, engaged in the transportation of the goods from the vendor to the vendee at the place of destination named by the vendee, as the agent of the vendor, and as long as the agent of transportation and delivery continued in possession of the property, such possession was that of the consignor. And if insolvency of the vendee happened while such possession lasted, the consignor, or vendor

could enforce his lien, by the exercise of the right of stoppage *in transitu*. A slight examination of the cases will illustrate and enforce these views.

A leading case in the courts, and upon which Lord KENYON, in *Ellis* vs. *Hunt*, said all the others are founded, is that of *Snee* vs. *Prescott*, before Lord HARDWICKE, in 1743 (1 Atk. 245), where he held that if goods are actually delivered to a carrier to be delivered to A., and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears A., the consignee, is likely to become bankrupt or is actually one, and countermands the delivery, he may do so, because the goods while *in transitu* might be so countermanded. This equitable rule of stoppage *in transitu* was first enunciated in 1690, in *Wiseman* vs. *Vandeputt*, in a case in chancery, heard before the Lords Commissioners (2 Vernon 203). A., being beyond seas, consigns goods to B., then in good circumstances in London, but before the goods arrive B. becomes a bankrupt. It was held that if A. can by any means prevent the goods coming into the hands of B. or his assignees, it is allowable in equity. As has been remarked, possession and continuance of possession are indispensable to the exercise of a right of lien in any case. An abandonment of the custody over which the right extends necessarily frustrates any power to retain them, and operates as an absolute waiver of the lien. The holder, in such case, is deemed to yield up the security he has upon the goods and trust to the personal responsibility of the owners (Cross on Liens, p. 38). It was formerly supposed that a completion of the voyage, or the arrival of the goods at the place of destination named by the buyer to the seller, was necessary to defeat the right of the vendor to seize the goods on non-payment of the purchase-money, and the insolvency of the purchaser. In *Holst* vs. *Pownal*, 1 Esp. Rep. 240, Lord KENYON said, at *nisi prius*, that in order to give the consignee a right to possession it should be a possession obtained by the consignee *on the completion of the voyage*. But in a later case, *Mills* vs. *Ball*, 2 Bos. & Pull. 456, referring to what had been said by Lord KENYON, that the right of stoppage continues until the goods have arrived at their journey's end, Lord ALVANLEY held that if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage.

This is upon the well-recognised and familiar principle that

the goods thereby came into the actual possession of the vendee, and thereby the vendor lost *all possession of them*, and his *lien* then terminated, and his right of stoppage *in transitu to enforce such lien* also terminated.

CHAMBRE, J., in delivering his opinion in *Oppenheim* vs. *Russell*, 3 Bos. & Pull. 42, says: "Perhaps the consignee himself may intercept the goods in their passage, and, indeed, I have little doubt but that if he do intercept them in their passage before the consignor has exercised his right of stoppage *in transitu*, and do take an actual delivery from the carrier before the goods get to the end of their journey, that such delivery to him will be complete." See also *Foster* vs. *Frampton*, 6 B. & C. 107. It follows, therefore, that it is not a necessary consequence that when a person orders goods to be delivered at a particular place, the *transitus* continues, in general, till they have been delivered accordingly, or that the vendee or consignee may not under any circumstances anticipate the delivery. For instance, if before the goods reach their ultimate destination he direct a postponement of their delivery, or do any act equivalent to taking actual possession of them, the *transitus* may be previously determined.

Thus, taking samples from the whole stock, and directing the carrier to keep the goods in his warehouse till he receives further directions, constitutes the carrier the consignee's warehouseman, and his possession is as much the possession of the consignee as if the latter had taken the whole bulk into his own warehouse. (Cross on Liens, p. 381; *Foster* vs. *Frampton*, *supra*).

Lord KENYON, previous to the case of *Ellis* vs. *Hunt*, in some case not reported, had said that to confer property on the consignee a corporal touch was necessary. And Lord MANSFIELD, in the case of *Hunter* vs. *Beall*, tried before him at the sittings at Guildhall, 1785, said the goods must come to the corporal touch of the vendees, otherwise they may be stopped *in transitu*. In delivering his opinion in *Ellis* vs. *Hunt*, 3 Term Rep. 464, Lord KENYON remarked: "As to the necessity of the goods coming to the 'corporal touch' of the bankrupt (in that case the consignee), that is merely a figurative expression, and has never been literally adhered to. For there may be an actual delivery of the goods without the bankrupt's seeing them—as a delivery of the key of the vendee's warehouse to the purchaser." And in the case of *Wright* vs. *Lanes*, 4 Esp. 82, the same judge observed: "I once said that to confer property on the consignee a corporal

touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him, and he has done so here. He has paid for the warehouse room; he has tasted and taken samples of the wines."

In *Dixon* vs. *Baldwin*, 5 East 175 (a leading case on this subject), Lord ELLENBOROUGH in commenting upon these observations of Lord MANSFIELD, in *Hunter* vs. *Beall*, remarks: "It is a figurative expression, rarely if ever strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far as representing the principal, as to make a delivery to him, a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance to or on account of the principal, in a mere course of transit towards him."

BAYLEY, J., in *Foster* vs. *Frampton*, *supra*, held the *transitus* in that case at an end. That where a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place—but that must be understood of a delivery in the ordinary course of business; for if the consignee before the goods reach their ultimate destination postpones the delivery, or does any act which is equivalent to taking actual possession of them, the *transitus* is at an end. HOLROYD, J., said: "The transit of the goods was at an end by the act of the consignee treating the goods as his own property, taking part to his own premises, and directing the other part to remain in the warehouse of the carrier." In *Wright* vs. *Larves*, 4 Esp. 82, it was decided that the consignee might meet the goods before they arrived at his residence, and take possession of them, and that this ended the transit, and in such a case no right of stoppage existed.

The railroad company, in the present case, in the completion of their purchase with Vose, Livingston & Co., and the delivery of the iron *to them*, became the absolute owners thereof, having *the possession of the same*, and exercising acts of ownership over it. The circumstance, that they thought proper for their own convenience or necessities, to transport it to a distant part

of the country, created *no lien* upon it for the purchase-money, nor did it revive any which might theretofore have existed. A careful examination of all the authorities which I have been enabled to reach, has failed to furnish any principle upon which Vose, Livingston & Co. can invoke the right of stoppage *in transitu*, under the circumstances disclosed in the present case. Those which have fallen under my observation, in which the right sustained has been in addition to those already referred to, are the following: *Holst* vs. *Pownal*, 1 Esp. 240; *Oppenheim* vs. *Russell*, 3 Bos. & Pull. 42; *Stokes* vs. *La Riviere*, cited 3 Term Rep. 466; *Hunter* vs. *Beale*, Id.; *Hodgson* vs. *Lay*, 7 Id. 436; *Coates* vs. *Railton*, 6 B. & C. 422; *Nichols* vs. *Le Feuvre*, 2 Bing. N. C. 81; *Jackson* vs. *Nichol*, 5 Id. 508; *Smith* vs. *Goss*, 1 Campb. 282; *Tucker* vs. *Humphrey*, 4 Bing. 516; *Whitehead* vs. *Anderson*, 9 M. & W. 518; *Aguire* vs. *Parmalee*, 22 Conn. 473. A brief synopsis of the facts in these cases, and the points decided, will substantiate the views already expressed.

Wiseman vs. *Vandeput*, 2 Vern. 203 (1690), was heard in chancery by the Lords Commissioners. Plaintiffs were assignees of Brunells, merchants in London, and claimed goods purchased by Brunells in Leghorn, to be shipped to them at London. The sellers, hearing of their failure before the goods left Leghorn, altered their destination, and consigned them to defendant, and it was held, that if the vendors could by any means get their goods again into their own hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity.

Ex parte Wilkinson, in chancery, 1755, before Lord HARDWICKE, as cited in Ambler 410. Wines were consigned from Lisbon to a merchant in London. The wines were brought to Lyons, and the consignee becoming bankrupt, the agent of the consignor stopped them there; and it was held, he might do so at any time before they got into the hands of the consignee. Lord HARDWICKE said, as there was no possession in the bankrupt, the agent had a right to stop them.

D'Aquila vs. *Lambert* (1761), in chancery, Ambler 399. The plaintiff being a merchant at Leghorn, by direction of defendant, Israeli, who resided in England, bought a large quantity of goods, and consigned them to him, and drew bills of exchange for the money. The bills were accepted by Israeli, but were protested for non-payment on his becoming insolvent, making a com-

position with his creditors, and assigning his effects in trust for them. Lord NORTHINGTON decreed the goods to be delivered to the plaintiff, holding, that the plaintiff was substantially to be considered as a merchant selling goods to Israeli, and that the case of Wilkinson is in point: *Snee* vs. *Prescott*, 1 Atk. 245 (1743). Lord HARDWICKE held, that the consignor's right of stoppage *in transitu*, was not divested until actual delivery to the consignee. He puts this case:—Suppose the goods are actually delivered to a carrier, to be delivered to A., and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears that A., his consignee, is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would lie by the assignees of A., because the goods while *in transitu*, might be so countermanded: *Stokes* vs. *La Riviere*, cited by counsel in *Ellis* vs. *Hunt*, 3 Term Rep. 466; but a more full note of it is found in the opinion of LAWRENCE, J., in *Bohtlingk* vs. *Inglis*, 3 East 396. It was tried before Lord MANSFIELD, at the Guildhall Sittings, December 18th 1784. In that case, Duhems, of Lisle, purchased of plaintiffs in London a quantity of ribbons, which plaintiff delivered to defendants, to be forwarded to Lisle. The goods were forwarded by the defendants to their correspondents at Ostend, with directions to send them to the Duhems. On the arrival of the goods at Ostend, the defendant's correspondents wrote to the Duhems, that the goods had arrived there, and that they awaited their directions. The defendants contended, that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhems, and that they, the defendants, had a right to retain them. Lord MANSFIELD said: "No point is more clear than that if goods are sold and the price not paid, the seller may stop them *in transitu*. I mean, in every sort of passage to the hands of the buyers. There have been a hundred cases of this sort. In short, when the goods are *in transitu*, the seller has that proprietary lien. The goods are in the hands of the defendant, to be conveyed—the owner may get them back again." Lord ELLENBOROUGH, in 5 East 185, says of this case: "This, however, in respect to Duhems, on whose right the defendant stood, was clearly a case of transit, not finished at the time the claim was made."

Hunter vs. *Beale*, cited in *Ellis* vs. *Hunt*, 3 Term Rep. 466,

was tried also before Lord MANSFIELD, at the Guildhall, in 1785. It was said to be an action of trover for a bale of cloth which was sent by Messrs. Steers & Co., of Wakefield, to the defendant, who was an innkeeper, directed for the bankrupts, to whom the defendant's book-keeper gave notice that a bale had arrived for them. Steers & Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers & Co. The bankrupts gave orders to the book-keeper of defendant to send the bale down to the gallery quay, in order to ship it on board a vessel to go to Boston. The defendant accordingly sent the bale to the quay, but arriving too late to be shipped, it was sent back to him. Within ten days afterwards a clerk of the bankrupts went to the wareroom of the defendant, when he asked him what was to be done with the bale in question, and was ordered by the clerk to keep it in his custody till another ship sailed, which would happen in a few days. The bankruptcy occurred soon after, and Steers & Co. claimed the bale of the defendant, who refused to deliver it up. Lord MANSFIELD was clearly of the opinion, that though the goods might be legally delivered to the vendees for many purposes, yet as for this purpose there must be an absolute and actual possession by the bankrupts, or (as he expressed it) they must have come to the corporal touch of the vendees, otherwise they may be stopped *in transitu*, a delivery to a third person to convey to them is not sufficient. This opinion of Lord MANSFIELD was distinctly overruled by Lord ELLENBOROUGH in *Baldwin* vs. *Dixon*, 5 East 182, where he says: "In *Hunter* vs. *Beale*, Sittings after Trin. 1785, before Lord MANSFIELD, I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee; *i. e.*, when they arrived at the innkeeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him, in their way to Boston, being in a new direction, prescribed and communicated by himself. And if the transit be once at an end the delivery is complete, and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and *ulterior destination*." In harmony with these views of Lord ELLENBOROUGH are the cases of *Allen* vs. *Gripper*, *Wentworth* vs. *Outhwaite*, and *Dodson* vs. *Wentworth*, already cited.

Hodgson, Assignee of Ward, vs. *Ley*, 7 T. R. 436. In this case butter was purchased in Cumberland by one Ward, and by an agreement between him and the seller it was delivered to a carrier named Golding, who was to take it to Stockton and deliver it to one Wilkinson, who was to forward it to London. Before it reached London the purchaser failed and the seller took the property, and it was held to be a clear case for the exercise of the right of stoppage *in transitu*, and that the circumstance of part payment, much relied on, did not vary the case from that of others, and that the assignee of the purchaser could not recover the property from the vendor.

Holst vs. *Pownal*, 1 Esp. 240. Dutton & Co. were merchants in Liverpool, and directed plaintiff, a merchant at Leghorn, to charter a vessel on their account, with a cargo of fruit. He chartered the vessel and put on board the cargo of fruit, and before the vessel arrived in Liverpool, Dutton & Co. stopped payment. On the arrival of the vessel in Liverpool, Spencer, one of the assignees of Dutton & Co., went on board the vessel, she being at quarantine, at a place outside of Liverpool, claimed the cargo, opened some of the boxes, and put two persons on board, who remained there alternately till quarantine ended on 18th June. On that day the vessel came into the harbor, and broke bulk on the 19th, when demand was made on behalf of the plaintiff for the fruit. Lord KENYON was of the opinion that it was a sufficient stoppage *in transitu* to maintain the action; that in order to give the consignees a right to claim by virtue of possession, it should be a possession obtained by the consignees on the completion of the voyage.

Coates vs. *Raillon*, 6 B. & C. 422. Plaintiffs were calico dealers at Manchester, and Butlers were Lisbon merchants carrying on trade in Lisbon and in London. They had a partner in the Lisbon house named Krus, and his name appeared in the firm doing business there. Goods were purchased of plaintiffs in Manchester by the London house for the Lisbon house, and the London house informed plaintiffs that they were to be sent to Lisbon, *as on former occasions*. The goods were on the 28th June delivered at defendant's warehouse, with an invoice. They were to forward them to Liverpool, to be shipped there to the purchasers at Lisbon. The goods remained in defendant's warehouse at the time of the failure of the Lisbon house, the purchasers. Lord TENTERDEN held that as the goods were purchased

of the vendors to be sent to Lisbon, the latter would have the right to stop them so long as they were in a course of conveyance to Lisbon. That the goods having been delivered by the sellers *for the purpose* of being forwarded to Lisbon, the *transitus* in that case was not at an end, and that the plaintiffs had a right to stop them. BAYLEY, J.: "It is a general rule, that when goods are sold to be sent to a particular destination *named by the vendee*, the right of the vendor to stop them continues until they arrive at that place of destination." He says of *Rowe* vs. *Pickford*, there was no ulterior place of destination named to the vendor. So of *Leeds* vs. *Wright:* there the vendor had sent the goods to the only place mentioned by the buyer, and as between the buyer and seller there was no place of ulterior destination.

Nichols vs. *Le Feuvre*, 2 Bing. N. C. 81. Le Couteur, who carried on business in Guernsey, purchased of plaintiff, in London, several bales of goods, which he directed to be forwarded to Guernsey, addressed to him, care of Le Feuvre, Southampton, who took them and shipped them to Guernsey in his own name. TINDAL, C. J., said, So far, therefore, as any question arises in this case of stoppage *in transitu*, there is nothing to take this case out of the general principle. The consignment was clearly to Guernsey, and the *transitus* was not at an end till the goods reached that destination.

Smith vs. *Goss*, 1 Camp. 282. Scaife, a merchant in Newcastle, ordered goods of the plaintiffs, at Birmingham, directing them to be forwarded to him at Newcastle, either by way of London or Gainesborough. If sent by way of London, they were to go to the care of defendant there, with directions to send them by first vessel to Newcastle. Lord ELLENBOROUGH held that the plaintiffs were entitled to recover, as the goods, having been sent to the defendant at London for the purpose of being forwarded to Newcastle, were at a stage upon their transit, and could not be considered as having reached their final destination, when at the wharfinger's in London.

Tucker vs. *Humphrey*, 4 Bing. 516. Flour was purchased by one Gilbert, with directions to send it to London by water, consigned to the wharf of the defendant, Humphrey. The flour arrived, but was not landed from the ship until after Gilbert became a bankrupt. PARK, J., says, it was agreed on behalf of Gilbert's assignees, that, by the arrival of the ship at the wharf, the transit was over; but that nobody can doubt that if such a state of things as is above supposed

had existed, such as the goods having been put into a warehouse on the wharf, which, the bankrupt, having no warehouse of his own, had been in the habit of using as his own, and marking or doing some act upon them, the transit would have been over.

Whitehead vs. *Anderson*, 9 M. & W. 518, was a shipment of timber from Quebec to plaintiff's assignor, and before its arrival at Liverpool the consignee became a bankrupt. The defendants, as agents of the consignor, demanded the timber, but this was after the consignee had been on board and made the same demand of the captain. It was held that there was no actual possession taken of the timber by the consignee, nor was there any constructive possession, as the promise of the captain to hold the timber for plaintiffs did not alter the relation in which he stood as before "as a mere instrument of conveyance to an appointed place of destination."

Jackson vs. *Nichol*, 5 Bing. N. C. 508, was a case where lead was purchased of plaintiffs in Newcastle by persons living in London, and the right was exercised to stop before it actually reached the possession of the buyers in London. TINDAL, C. J., says the general rule is, that the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee; and if the lead had in that case been delivered into the possession of the agent of the buyers, there to remain until he received orders for its ulterior destination, such possession of the agent would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end. The case would then have fallen within the principle laid down in *Dixon* vs. *Baldwin*. But the facts in that case were, that the agent merely received to forward to the buyers in London—he was merely acting in the conveyance. The same rule was recognised as in *Whitehead* vs. *Anderson*, that the demand of possession was not taking possession. The Chief Justice said: "Although it might be conceded to be the better opinion that if the vendee actually receives the possession of his goods in their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone; yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery before the voyage has completely terminated, deprives the consignor of his right of stoppage."

The principle of this case was affirmed in that of *Aguirre* vs.

Parmelee, 22 Conn. Reps. 473. There a purchase of wool had been made in New York by an agent of the purchaser, a manufacturing corporation, located in Connecticut, for the purpose of being there manufactured. It was delivered to the agent to be sent to the buyers, and while on its transit from New York to Connecticut, and before it came to the possession of the vendees, it was stopped by the seller. The court held it to be an ordinary case of stoppage *in transitu*, that the agent in New York, who purchased the wool and to whom it was delivered, stood in the position of a mere forwarding agent. That to take away the right of stoppage, there must have been an absolute delivery in New York for the use of the vendees, and it must have been a full and final delivery as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal, and this delivery should be at the place named by the purchaser to the vendor as the place of final delivery or ultimate destination of the goods.

The cases in the courts of this state upon this subject may properly be considered here. The first in point of time is that of *Hollingsworth* vs. *Napier*, already referred to. The next is that of *Buckley* vs. *Furniss*, 15 Wend. 137. Plaintiff was a merchant in Troy; Titus, the purchaser, lived at Titusville, eight miles from Malone, in Franklin County. He sent an order dated Malone, for four tons of iron, which the plaintiff produced, and also a previous order, dated nine days previously, for half a ton of steel to be sent to him, and directed it to be forwarded to the care of Green, at Plattsburgh. The iron was sent, directed to Titus, at Malone, care of Green, at Plattsburgh, and sent by canal-boat and sloop to Green, at Plattsburgh. On 9th September, forty-one tons of iron were delivered by Green to one Burton, a carrier by canal, employed by Titus to convey the iron from Plattsburgh to Titusville. While Burton was at Malone, the iron was taken out of his possession on an attachment against Titus in favor of defendant, Furniss. Titus became insolvent, and his drafts given for the iron were protested. On the trial, defendant moved for a nonsuit, which was granted on the ground that the evidence did not show a right in the plaintiff to stop the iron *in transitu*. The Supreme Court set aside the nonsuit and granted a new trial, the court holding that in the case of a sale on credit, the vendor may resume the possession of the goods while they are in the hands of a carrier or middleman in their

transit to the consignee or vendee on his becoming bankrupt or insolvent.

In this case the goods had neither reached their destination, nor had they come to the actual possession of the vendee. They were in the hands of a carrier or middleman on their way to the vendee, and the plaintiff had a right to stop them. The case was again before the court in 17 Wend. 504, and the question then was whether the delivery of one wagon-load of the iron to Titus at Titusville before the plaintiff intercepted the residue, was a delivery of the whole consignment so as to destroy the right of stoppage *in transitu* as to the portion not delivered, and the court held it was not. That the delivery of a portion of the consignment was no evidence of any act of possession or ownership as to the forty-one bars of iron in controversy.

Hitckcock vs. *Covill*, 20 Wend. 167. Graves, the purchaser, bought goods in the city of New York of the plaintiff. He resided at Willardsburg, Tioga county, a distance of between thirty and forty miles from Havana. Havana was at the head of navigation on the Seneca Lake, to which point goods were forwarded from New York by canal and lake boats. Graves directed the goods to be shipped on board lake or canal boats to Havana, and they were boxed and directed to him at Willardsburgh, and there shipped. On 28th May, Graves came to Havana for his goods, but finding they had been levied on by Covill, sheriff of Tioga county, by virtue of an execution on a judgment against him, he did not take them. The Supreme Court held that the *transitus* was at an end, but on the ground of fraud, refused to disturb the verdict in favor of plaintiff. The case was taken to the Court of Errors, and the judgment of the Supreme Court affirmed. The Chancellor, in giving the opinion of the court on the question of stoppage *in transitu*, takes the ground that the *transitus* was not ended, that the delivery to the warehouseman at Havana was but a delivery to a middleman, engaged in the conveyance. That the goods, being directed to the vendee at his place of business at Willardsburgh, they were delivered at the warehouse at Havana merely because that was a point in the transit, and not because the warehouseman was the general agent of the purchaser. The fact that there was no public conveyance from there to the residence of the purchaser, and that, therefore, it was necessary for the purchaser to send a team himself to complete the transit, he apprehended could not defeat

the right of stoppage, while the goods remained in the hands of the warehouseman, who was a middleman merely, and not the general agent of either the vendor or vendee. He admits that if the purchaser had sent on his own teams and thus obtained possession of the goods on a delivery thereof to his own teamsters by the warehouseman, a different question would be presented.

Harris vs. *Pratt*, 17 N. Y. Rep. 249, is a case which was carefully considered in this court, and the opinion contains a review of all the leading cases on the doctrine under consideration. In that case plaintiffs were manufacturers at Leicester, England. John and James Hall were partners in trade, having a house at Nottingham, England, and one in the city of New York. One of the partners resided at Nottingham, and one in New York. The goods were purchased by an agent of the Halls, with directions to manufacture them for the New York market, and stating that they were to go to New York, and directing the plaintiffs to pack them in the usual way and send them to Edwards, Sandford & Co., Liverpool, and that they were not to be forwarded for shipment until about May 1st 1854. In February 1854, plaintiffs informed Halls at Nottingham that the goods were ready, and asked for the marks and numbers to put on the cases, which were sent. On the 25th of April, the plaintiffs informed the Halls, at Nottingham, that they had sent the goods in eight cases to Edwards, Sandford & Co., Liverpool, "to await their further orders for shipment," and at same time plaintiffs wrote shipping agents that they had sent the eight cases for the Halls of Nottingham, from whom they would receive further instructions. The Halls, by letter from Nottingham, instructed Edwards, Sandford & Co. to ship the cases to the New-York house. They arrived in New York June 10th, before which time Halls had stopped payment. On the 14th June, the agent of plaintiffs demanded the goods of the owners of the ship, of the custom-house officers on board, and also of the defendants, to whom Hall, the remaining partner, had made an assignment. This court held that the right of stoppage *in transitu* existed, and that the transit was not at an end. The general rule is well stated, and such as is sustained by the authorities, "that while the goods remain in the possession of persons concerned in their transportation to the place of destination named by the purchaser, they may, in the event of his failure, be reclaimed by the seller. It is not material whether the person in whose possession they are when the seller interposes

his claim be a carrier, a warehouse keeper, a wharfinger, packer, or other depositary, or an agent for the purpose of forwarding, nor by which of the parties to the sale he was employed." And the learned judge, in the leading opinion, says: "A vendee purchasing goods abroad may receive them into his actual possession at the place of purchase, and the right of stoppage will not thereafter exist. So he may take actual possession of them at some point intermediate to the place of purchase and the place where he designs to use or dispose of them, or employ an agent so to do, and thereby terminate the transit, and with it the right of stoppage."

(*Concluded in September number.*)

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.[1]

AGENT.

Offer of Judgment by Defendant's Agent.—An offer of judgment in a suit before a justice of the peace may be made by an agent of the defendant in his absence; and on appeal, judgment will be entered without costs, where the verdict was for the same sum as that for which judgment had been tendered before the justice: *Randall* vs. *Wait*, 12 Wright.

CERTIORARI

In Criminal Case—Special Allocatur.—A defendant in a criminal case cannot have a writ of error on *certiorari*, except by special allowance of the Supreme Court, or a judge thereof, or by consent of the attorney-general: *The Commonwealth* vs. *Capp*, 12 Wright.

But the Commonwealth is not subject to this disability: and her representative, the district attorney of the proper county, may take out a writ of error or *certiorari* without such allowance or consent: *Id.*

DECEDENT.

Distribution of Estate of Insolvent Decedent—Debt due to Decedent at time of his death not set off against debt owing by him but not due.—In the distribution of the estate of an insolvent debtor, a debt due at the time of his death to him, cannot be set off against a debt owing by him, not then due: *Appeal of the Farmers' and Mechanics' Bank*, 12 Wright.

Thus, where the decedent was indorsee on notes discounted for his benefit at bank, but due and protested after his death, the bank is not entitled to retain a deposit of money then standing on the books to his credit, as a set-off against his liability on the notes: *Id.*

Beaver vs. *Beaver*, 11 Harris 167, does not overrule *Bosler* vs. *The*

[1] From R. E. Wright, Esq., Reporter; to appear in vol. 12 of his Reports.